

## FINAL STATEMENT OF REASONS

a) Update Regarding Initial Statement of Reasons and Incorporation by Reference

The August 13, 2018, 15-day renote with attachments, including Addendum to the Initial Statement of Reasons, and the October 25, 2018 15-day renote with attachments, including the Post August 13-28, 2018 15-Day Renote Addendum to the Initial Statement of Reasons, are incorporated herein by reference in their entirety and available electronically at <http://www.cdss.ca.gov/inforesources/Emergency-Regulations/ORD-No-1017-21>.

The addendums include summaries of testimony made during the 45-day public comment period and the August 13, 2018 15-day renote period regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate testimony. In addition, Specific Purpose and Factual Basis information was updated for modified sections.

b) Local Mandate Statement

These regulations do not impose a mandate on local agencies or on local school districts. There are no state-mandated local costs in this order that require reimbursement under the laws of California.

c) Statement of Alternatives Considered

In developing the regulatory action, the Department considered the following alternatives with the following results: There have been no alternatives presented for review.

The Department has determined that no reasonable alternative considered or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective as and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

d) Statement of Significant Adverse Economic Impact On Business

The Department has determined that the proposed action will not have a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. Due to Home Care Organization (HCO) licenses being issued on a biennial basis [every two (2) years], the Department does not yet have a baseline established to determine how many HCOs have not applied for or will not renew their license for purely economic reasons.

e) October 25, 2018, through November 9, 2018, 15-Day Renotice Testimony and Response

Pursuant to Government Code section 11347.1, a 15-day renotice and complete text of modifications made to the regulations, including the Post August 13-28, 2018 15-Day Renotice Addendum to the Initial Statement of Reasons, were made available to the public following the August 13, 2018 through August 28, 2018 15-Day Renotice.

The following testifiers submitted written testimony during the 15-day comment period:

A. At-Home Senior Services, Jim Small, Executive Director

The following written testimony was received during the 15-day comment period:

A. Comments from At-Home Senior Services

1. **Sections 130054(a)(1), (a)(1)(A), and (a)(1)(B):**

Comment:

"Please consider my comments on the following section.

**130054 Unlicensed Operation**, currently reads:

(a) A civil penalty of \$900 per day shall be assessed for the operation of an unlicensed Home Care Organization under any of the following conditions:

(1) Upon receipt of the Notice Operation in Violation of the Law, the operation fails apply and obtain license and continue to operate.

(A) For the purpose of this an application shell be deemed complete if it includes the information required in 130022.

(B) The complete application shall be deemed to be submitted with received by the Department.

(2) & (3) follow, but do not apply to the initial application.

**Discussion:**

From reading paragraph (1) it appears that following the Notice, if the operator submits an application and after a time it is deemed complete and is a license is granted, no fine would be assessed for the period of non-licensed because the text reads “applied and obtain” a license.

If the Department intends to impose and collect fines for non-licensed operation the regulatory language should be clear, as violations will likely be referred to the County and City District Attorneys. (See Note) A clear statement about when penalties are is needed for District Attorney’s feel confident of conviction.

*Note: From the State Dept of Justice, Attorney General’s website, “If you think a business has committed fraud or a crime, please tell your local district attorney’s office or your City Attorney.”*

**Recommendation**, modify the text as follows:

(a) A civil penalty of \$900 per day shall be assessed for the operation of an unlicensed Home Care Organization under any of the following conditions:

(1) Upon receipt of the Notice Operation in Violation of the Law, ~~the operation fails apply and obtain license~~ and continue to operate.

~~(A) For the purpose of this an application shall be deemed complete if it includes the information required in 130022.~~

~~(B) The complete application shall be deemed to be submitted with received by the Department.~~

(2) & (3) follow unchanged."

**Response:**

The Department appreciates this comment, however is not amending the regulation at this time. Further, the comment does not relate to the modified language for the purpose of this comment period.

f) Testimony and Response Update

Due to a time zone difference, an e-mail communication mistakenly appeared to have been submitted after the 5:00 p.m. deadline on April 23, 2018; consequently, the Department did not respond to the comments. The same comments were resubmitted to the Department during the August 2018 15-day renote process; consequently, the Department responded that the comments were out-of-scope of the 15-day renote.

While culling the file to submit to Office of Administrative Law for Certificate of Compliance review, the error of the time zone difference was discovered.

The Department is responding to the comments from Home Care Association of America (HCAOA) as follows:

1. **Section 130001(a):**

Comment:

*(a) Unless otherwise specified by the Department, the Home Care Organization shall maintain all personnel and administrative records in a hard copy format, as set forth in regulations.* HCAOA understands the need to maintain personnel and administrative records. We question the need to maintain these records in a hard copy format. Furthermore, the requirement is not clear how long a HCO is required to maintain the records. The HCSB proposal to impose a requirement for records to be maintained in a hard copy format seems to run counter to existing California state policy to conduct business in an environmentally friendly manner and move toward maintaining records in alternative electronic recordkeeping formats. Further, the proposal lacks a defined timeframe for which to maintain the records. HCAOA recommends the HCSB adopt a record retention policy for these records and all maintenance of record requirements under these regulations.

Response:

The Department appreciates this comment and agrees that electronic records should be allowed. The Department has made changes to Section 130001 to that effect. In addition, please refer to Section 130066(h) for retention requirements for personnel records.

2. **Section 130021(c)(2)(B):**

Comment:

We ask the HCSB to explain the need to inquire about the gender of a HCO applicant for license and question the need to have that requirement in the regulations.

Response:

The Department appreciates this comment but is not amending the regulation at this time. Gender does not have a bearing on approval; however, it is a component of identification in the criminal background check process.

3. **Section 130028:**

Comment:

We appreciate that the HCSB works diligently to operate the program in a cost-effective manner and to ensure there is adequate funding through fees and other sources to maintain the program. HCAOA has worked with DSS and HCSB to mitigate the costs of the licensing fees on our member companies of which many are classified as small businesses. We would ask the HCSB to continue to consider the impact before imposing any proposed new fees on HCOs.

Response:

The Department appreciates this comment but is not amending the regulation at this time. The Department recognizes the impact any fee increase has on the industry and strives to keep fees at a rate feasible to fully support the program and provide high quality of service.

4. **Section 130030:**

Comment:

We appreciate that the HCSB has allowed for a licensed HCO to operate a suboffice for the purpose of HCA training and recruitment or exchange of HCA personnel documents. We request that HCSB reconsider the definition of a suboffice, to be less restrictive and not limiting to the scope of the operations of the suboffice. In addition, we question the requirement limiting the staffing to the suboffice, so that a full time employee can be allowed to aid in recruitment, training and exchange of HCA personnel documents.

Response:

The Department appreciates this comment but is not amending the definition of suboffice (found in Section 130003(s)(5)) or this regulation section at this time. A HCO may apply for a waiver of this regulation if there is a HCO-wide need or circumstance and the HCO has an alternative means which meets the intent of this regulation. Waiver requests will be considered on a case-by-case basis. In addition, following the public hearing on April 23, 2018, this regulation was amended by removing the term “full-time staff” in order to clarify that this regulation applies to the number of hours in a week that a HCO may operate a suboffice, and not to the time-base of staff employed by the HCO.

5. **Section 130066(c)(4):**

Comment:

*(c) (4) Each Affiliated Home Care Aide’s personnel record shall also include the following: A signed Statement Acknowledging Requirements to Report Suspected Abuse of Dependent Adults and Elders (SOC 341 A) **and a signed statement acknowledging the requirement to report suspected or known child abuse** pursuant to Subdivision (e) of Section 1796.42 of the Health and Safety Code. As commented below, we support the use of SOC 341 A form to report alleged and suspected abuse/neglect of elder and dependent adults receiving care in the home. We seek clarification on whether the signed statement acknowledging the requirement to report child abuse (as opposed to only elder abuse) will be added to the SOC 341 A form or will HCOs need to develop a separate form for compliance with this requirement.*

Response:

The Department appreciates this comment but is not amending this regulation at this time. Following the public hearing on April 23, 2018, this regulation was amended after it was determined the regulation did not include the requirement to report child abuse, as required by statute. However, the Department is not currently requiring a specific form for HCOs to use in obtaining a signed statement from personnel acknowledging this requirement. A HCO may develop its own form for this purpose as long as it is in compliance with the statutory requirement.

6. **Section 130071(a)(7):**

Comment:

*(7) A registration status displaying “registered-pending renewal” on the Home Care Aide Registry is displayed when the registered Home Care Aide’s has subsequent violent criminal history, subsequent felony conviction,*

*administrative action under review by the Department, or the Department has issued an immediate exclusion order prohibiting the Affiliated Home Care Aide from employment pending administrative action proceedings. We request that HCSB replace the term “Registered-Pending Renewal” with “Suspended” to make it clear on the status of the HCA to ensure that the individual shall not continue to provide home care services until final determination.*

Response:

The Department appreciates this comment but is not amending the regulation at this time. The term “registered-pending review” is defined in regulations, and it makes clear that a HCA cannot work while under this status. The Department is currently in the process of putting all of the different HCA statuses onto the public registry to make this information more easily accessible and clear to anyone using the website.

7. **Section 130092:**

Comment:

We support these exclusions outlined in this section.

Response:

The Department appreciates this comment.

8. **Section 130100(c)(2), and (c)(2)(B) through (c)(2)(C):**

Comment:

*(2) A third-party repair person, or similar retained contractor, if all of the following apply: (B) The individual is not left alone with clients or prospective clients, and does not have access to confidential client information. (C) When a client, prospective client, or confidential client information is accessible to the repair person or contractor, a staff person who has a criminal record clearance or criminal record exemption is also present. This paragraph states that if a HCO were to hire a third party repair person or similar contractor that they are not to be left alone with a client and one of our staff must be present. This seems a highly unreasonable burden on the HCO.*

Response:

The Department appreciates this comment but is not amending these regulations at this time. Following the public hearing on April 23, 2018, the regulations were amended to clarify these regulations apply to individuals who are hired at the HCO, and not in the client’s home. It is unclear from the

comment if the issue being addressed pertains to repair persons or contractors hired at the HCO or in the client's home. If it pertains to individuals hired in a client's home, then the Department does not have jurisdiction over these situations. However, if it pertains to individuals who are hired at the HCO, then the Department has determined these regulations, as written, are necessary to ensure the health and safety of clients. Allowing individuals without a criminal background clearance to be left alone with clients, prospective clients, or to have access to confidential client information at a HCO would put vulnerable clients at risk.

9. **Section 130110(b):**

Comment:

*(b) After a review of the criminal record information, the Department may grant a criminal record exemption if the affected individual presents substantial and convincing evidence satisfactory to the Department that the individual has been rehabilitated and presently is of such good character pursuant to Section 1522 of the Health and Safety Code as to justify registration on the Home Care Aide Registry, being issued or maintaining a Home Care Organization license, or employment or volunteer work with a licensed Home Care Organization....*

We appreciate that the HCSB may have the authority to grant a criminal record exemption and ask HCSB to provide more specific information on the how that determination is made, what criteria is used and what procedures are in place to grant the exemption.

Response:

The Department appreciates this comment but is not amending these regulations at this time. Please refer to Health and Safety Code Section 1552 and subsections (d), (e), (l), and (j) of these regulations for information regarding some of the factors considered and criteria used in making determinations on criminal record exemptions. Criminal record exemptions are determined on a case-by-case basis, depending on the specific facts and circumstances regarding each individual's criminal history.

10. **Section 130110(h)(1):**

Comment:

*(h) (1) Other than maintaining the Home Care Registry, the Department shall have no oversight responsibility regarding Home Care Aides. Any condition placed on a Home Care Aide shall relate solely to any criminal conviction information received by the Department. The purpose of the Home Care Services Consumer Protection Act is to promote consumer protection for seniors and individuals with disabilities who hire private aides to come into their*



homes and provide assistance with activities of daily living. We believe that HCSB should have processes for reporting bad-behavior, and policies and procedures in place to for recording such incidents, including penalties for such bad behavior.

Response:

The Department appreciates this comment but is not amending the regulation at this time. The California Legislature determined the extent of the Department's authority in this area via the legislative process. The Legislature, per Section 1796.15 of the Health and Safety Code, granted the Department's only purview over HCAs to maintenance of the Home Care Aide Registry. The Department does not have the legal authority to expand the scope of its authority or its investigative or punitive powers over HCAs in regulations. Any expansion of such authority over HCAs must be made via a statutory amendment that is approved by the Legislature.

11. **Section 130110(n):**

Comment:

*(n) At the Department's discretion, an individual who is otherwise eligible for a simplified criminal record exemption may be required to go through the standard criminal record exemption process if the Department determines such action will help to protect the health and safety of clients.* This section distinguishes between a "simplified" and "standard" criminal record exemption process and implies that there are two separate processes. We would ask HCSB to clarify the differences between the two processes and provide information on the specific procedures in place to determine how each process is determined.

Response:

The Department appreciates this comment but is not amending the regulation at this time. The standard criminal record exemption process is described in Sections 130110(a) through (l), and the simplified criminal exemption process is described in Section 130110(m) of the regulations.

12. **Section 130110(t):**

Comment:

*(t) At the Department's discretion, a criminal record exemption may be rescinded if it is determined that: (1) The criminal record exemption was granted in error; (2) The criminal record exemption does not meet current criminal record exemption laws or regulations; or (3) The conviction for which a*

*criminal record exemption was granted subsequently becomes non-exemptible by law.* This section provides that a criminal record exemption may be rescinded based on certain determinations set forth in the regulations. We would ask HCSB to clarify how the determinations are made and to provide information on the specific procedures in place to make those determinations.

Response:

The Department appreciates this comment but is not amending the regulation at this time. Although unintentional, errors may occur during the criminal record exemption process. To protect the health and safety of clients, the Department needs a mechanism to correct errors. In addition, changes to criminal and/or exemption laws are determined by the California Legislature, and the Department is bound by their determinations even if the changes occur after an exemption was previously granted.

13. **General Comments:**

As the HCSB moves forward to implement these regulations, HCAOA would like to provide the following general comments that focus on program efficiency and effectiveness.

Comment:

We urge HCSB adhere to strict timeframes for enforcement of civil penalties for unlicensed entities.

Response:

The Department appreciates this comment; applicable timelines for civil penalties are set forth in sections 130052 and 130054.

Comment:

We recommend HCSB develop an operation manual reflecting HCSB policies and procedures. An operations manual helps to maintain consistency among agency staff with regard to agency regulatory procedures. The information should be made available on the HCSB website, similar to other agencies.

Response:

The Department appreciates this comment; however, this issue does not pertain to these emergency regulations.

Comment:

We recommend the HCSB take the necessary steps to reduce HCSB costs related to licensing and registration expenses. Cost pressures are becoming extreme as HCOs and those we serve are affected by these costs.

- Eliminate much of the travel costs associated with Sacramento-based analysts visiting licensees throughout California and utilize evaluators in local offices throughout the State.
- Consider utilizing an electronic submission process of required documents.
- Make greater use of electronic and automated communications. Reduce or eliminate postal mail.

Response:

The Department appreciates this comment and will consider your recommendations in the future; however, this issue does not pertain to these emergency regulations.

Comment:

Measure HCSB productivity utilizing the following suggested performance measurements:

- Registration applications completed vs. registration applications received.
- Licensee applications completed vs. registration applications received.
- Registration application denials appealed to Administrative Law Judges vs. appeals reversed by Admin Law Judges, for the past 12 months.
- Registrations revoked by the DSS vs. total registrations completed for the 12 months.
- Licenses revoked by DSS vs. total active licensees for the past twelve months.

Response:

The Department appreciates this comment; however, this issue does not pertain to these emergency regulations.

14. **Additional Comments:**

Comment:

The HCSB should consider a deemed status policy to recognize voluntary accreditation as an alternate pathway to licensure. The CA Department of Health has adopted a policy in the home health care agency licensing process to recognize accrediting organizations as a pathway to licensure to alleviate the administrative burden for providers that chose accreditation. This would also serve as a potential cost savings if the Department can develop a process

to deem a credible third party accrediting organization to demonstrate compliance with the home care licensing requirements.

Response:

The Department appreciates this comment and will consider your recommendations in the future; however, this issue does not pertain to these emergency regulations.

Comment:

We would like HCSB to take a broader approach to ensuring specific labor requirements including appropriate worker classification of Home Care Aides. We urge HCSB to work with the Department of Labor & Workforce Development to jointly address this concern that remains unchecked in particular as it relates to ensuring aides are properly classified as W-2 employees. We urge HCSB to work with policymakers to make the appropriate changes to the California civil code and subsequently issue regulations to ensure compliance with federal and state labor worker classification regulations.

Response:

The Department appreciates this comment and will consider your recommendations in the future; however, this issue does not pertain to these emergency regulations.

Comment:

We support the use of SOC 341 A form to report alleged and suspected abuse/neglect of elder and dependent adults receiving care in the home.

Response:

The Department appreciates this comment.